No. 11418

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,

Appellee.

CAPITOL CHEVROLET COMPANY, a corporation,

Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,

Appellee.

And Others.

APPELLANT CAPITOL CHEVROLET COMPANY'S OPENING BRIEF.

MORRIS LAVINE,
619 Bartlett Building, Los Angeles 14,
Attorney for Capitol Chevrolet Company.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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To: The Honorable Judge of the United States Circuit Court of Appeals for the Ninth Circuit:

Jurisdiction.

Jurisdiction is conferred by Sections 41 and 42 of Title 28, U. S. Codes and by Section 225, Title 28, U. S. Codes. The amount in controversy exceeds $3,000 exclusive of interest and costs.

The plaintiff is the Defense Supplies Corporation, a Government Agency of the United States, organized under Section 5d of the Reconstruction Corporation Act (Act of January 22, 1932), Chapter VIII, 47 Stats. at L, p. 5, Title 15 U. S. C. A., paragraphs 601-607, as amended.

The defendant, Capitol Chevrolet Company, is a California corporation having its principal place of business in the City of Sacramento, State of California.

Following the rendition of the judgment by the District Court of the United States on April 15, 1946 [R. pp. 83, 84] notice of appeal was thereafter duly and regularly filed [R. pp. 90-96] by the various parties in the case.

Statement of the Case.

Lacking facilities to store tires being gathered under the War Program of collecting surplus tires, the Government of the United States organized the Idle Tire Act Program in the collection of surplus and extra tires of all kinds and character. Several small storage places were secured in the City of Sacramento, but it was desired to collect all of these tires in one place outside of the city. Acting through the Lawrence Warehouse Company, the Government located the "Ice Palace" outside of the City of Sacramento which had been used for a skating rink and which consisted of a large area on the Davis Highway in Sacramento, and which had a skating rink in the center. Adjoining the skating rink and connected with it was a small building having an engine room and a brine tank, a well being dismantled and fire hydrants at four corners of the building.

The Government inspected the building and selected it in the condition in which it appeared and entered into a

contract with the Lawrence Warehouse Company, by the terms of which the Lawrence Warehouse Company was to arrange for the storing of the tires under instructions from the Government.

With respect to certain important factual and legal issues this case has no direct precedents.

This results from the fact that prior to World War II exigencies had never arisen which required the commandeering by the Government of such articles as tires and tubes by the Government. Back of the present litigation, the trial and this appeal that circumstance is involved in the decisive issues.

The plaintiffs herein, Defense Supplies Corporation, is an agency which was created under the Reconstruction Finance Corporation Act to collect for the National Government the available automobile tires and tubes throughout the country. In 1943, plaintiffs formed and put into effect the "Idle Tire Purchase Plan", by which the subagencies were set up in each district or "area" one of which was the "area of Northern California."

Officers of Defense Supplies Corporation, (to be termed herein, "the corporation"), established an office in San Francisco for said area and sent out employees to locate buildings in which the tires and tubes to be acquired might be stored. Apparently this was being done while other details of the plan were being worked out.

During this period, John McKee was an agent of the Corporation, who was located at the San Francisco office, and Alfred D. McClellan, an "examiner", working under McKee, was supervising the "Idle Tire Program." [R. pp. 137, 138.]

A Mr. Baxter was a "field agent" of the corporation, one of whose functions was to make investigations with respect to available storage buildings for tires and tubes. In the performance of this duty he investigated the "Ice Palace" building near Sacramento. [R. p. 142.]

The "Ice Palace" was purchased by Clyde W. Henry and Charles Parella prior to March 1, 1943. [R. pp. 159, 181.]

On that date the corporation entered into a written lease agreement of the Ice Palace with the Lawrence Warehouse Company, as lessor, pursuant to a previously made "master contract" by which the Lawrence Company was to act in an intermediary capacity, contracting with the Corporation for leasing of certain buildings and releasing them to others through agency agreements. [R. pp. 109, 110.]

However, as early as October 1, 1942 the Lawrence Company had entered into an agreement, entitled "Agency Agreement with Government Custodian", with the Capitol Chevrolet Company for the storage of tires and tubes in the Ice Palace to be delivered by the Lawrence Company, as custodian for the plaintiff corporation. [R. p. 341.]

Prior to October 1, 1942, arrangements had been made by an employee of the corporation for the leasing of the Ice Palace by the Chevrolet Company and the corporation had authorized said company to lease the same and had approved of the agreement between the Lawrence and the

Chevrolet Companies before it was made, and had furnished the Lawrence Company with the form of the lease agreement which they signed. [R. pp. 110, 111.]

After March 1, 1942 and before April 9, 1943, tires and tubes were delivered at the Ice Palace warehouse by employees of the Corporation and on the last named date a fire started in the "engine room", which immediately adjoined the warehouse, which consumed the building and destroyed its entire contents. [R. 227-229, 345.]

It is important to note that arrangements had been made between the plaintiff corporation and the Lawrence Company by which the Corporation designated the Burns Detective Agency to be employed to guard the Ice Palace by a twenty-four hour a day lookout, for which services the Lawrence Company were to pay the Burns Agency and to be reimbursed by the corporation [R. 284-285]; also the corporation, soon after March 1, 1943, provided its watchmen and the Chevrolet Company with a list of persons who, only, might be permitted entrance to the warehouse and gave instructions that no property be permitted to be taken from the premises except upon approval of the Chevrolet Company.

The Ice Palace was occupied exclusively by the property of the Corporation. The operation was joint but the actual supervision and guarding of the property was had by agencies selected and actually paid by plaintiff.

The action, as tried, is for damages resulting from the destruction of tires and tubes alleged to have been burned in the fire.

During the trial plaintiff's witness McClellan admitted inability to prove the number of tires which were destroyed except by a letter from an official of the Chevrolet Company. The letter was not based upon the writer's personal knowledge. [R. p. 148.]

Also plaintiff's counsel stated that he could not prove the grades of the tires, except those classed as scrap, nor could he establish the market value of either tubes or tires, and that he would attempt to prove damages by showing the cost of the tires to the plaintiff for which he would show that OPA ceiling prices were paid.

In lieu of evidence to show the number of tires on storage of the various grades said counsel avowed that he would prove the entire number of tires of each grade purchased in the area of Northern California and establish the average percentage of tires in each grade and would ask that the tires destroyed in the Ice Palace be regarded as divided numerically according to such averages, for the purpose of determining their cost to plaintiff corporation. [R. pp. 117, 118, 121.]

Plaintiffs witness established that the OPA ceiling prices were fixed by the United States government; that the law did not permit owners of automobile tires or tubes to sell them except to it and compelled the owners to sell those which the Defense Corporation appraisers appraised and at the prices fixed by the appraiser.

To prove negligent omission to perform the alleged duty of appellant to safeguard the tires and tubes, the corpora-

tion's witness testified that the corporation itself, or through the Lawrence Warehouse Company, employed the Burns Detective Agency to maintain a twenty-four hour a day watch and lookout over the Ice Palace and premises [R. p. 284 *et seq.*], and that one of the watchmen was on duty when a man named McGrew, who had been admitted to enter the engine room to remove some equipment belonging to the Landlord, was using an acetylene torch of a highly dangerous character; that the watchman observed what was being done, but merely walked away, and within a few minutes the fire started and the warehouse was in flames. [R. pp. 293, 296.]

The plaintiff's own witness, McGrew, denied that his work started the fire. [R. pp. 220-225]. He attributed the fire to an unknown source; yet, the court, without any evidence to support it, found that his work started the fire. He was the plaintiff's own witness and the plaintiff was bound by his testimony, since no impeaching evidence was offered (C. C. P. Sec. 2049) and he was not called as an adverse witness under Section 2055 of the Code of Civil Procedure.

When the plaintiff rested its case, the defendants also rested and moved to dismiss the action, which motion, after being taken under advisement, was denied.

Specification of Error Upon Which the Appellant, Capitol Chevrolet Company Intends to Rely.

I.

The decision and judgment are contrary to the law and the evidence. The evidence is insufficient to prove negligence or liability on the part of Capitol Chevrolet Company:

(a) There being no contractual relationship between plaintiff and appellant, the only basis for liability must be negligence and there was no proof of such negligence.

(b) There is no substantial evidence to support the finding by the trial court of negligence on the part of the Capitol Chevrolet Company. The finding is contrary to the evidence.

(c) If negligence is assumed, plaintiff is guilty of contributory negligence.

II.

The Court erred in the admission and exclusion of evidence.

(a) Proof of the price paid for tires and tubes by the Government was inadmissible as evidence of the value of such articles.

III.

The Court erred in its determination of damages in respect to the number and value of the articles involved. Finding II of the Finding of Fact has no support in the evidence and is contrary to the evidence.

IV.

The lack of proof regarding the value and the uncertainty render the judgment void.

Statutes Involved.

Warehouseman's Act, Civil Code of California, Section 1858e. Liability for Loss by Fire.

> "No warehouseman or other person doing a general storage business is responsible for any loss or damage to property by fire while in his custody, if he exercises reasonable care and diligence for its protection and preservation."

I (a).

There Being No Contractual Relationship Between Plaintiff and Appellant the Only Basis for Liability Must Be Negligence.

Respondent had no contract with appellant.

Whatever the obligation of appellant might have been to the Lawrence Warehouse Company, it owed none to respondent as far as contractual liability is concerned.

Even if it be assumed that appellant was an agent of the Lawrence Warehouse Company, an agent is not liable to a third person for injury resulting from omission of the agent to perform a duty owed to his principal by reason of the agency. (3 C. J. S. 134; Mechem on Agency, Secs. 569, 572, 573.)

Mauer v. Egan, 182 N. Y. Supp. 180; *Knight v. Atlantic Coast L. R. Co.,* 73 F. (2d) 76; *Kelly v. Robinson et al.,* 262 Fed. 695; *Macutis v. Cudahy Packing Co. et al.,* 203 Fed. 291; *Clark v. Chicago R. I. & P. Ry. Co.,* 186 Fed. 539; *Floyt v. Shenango Furnace Co. et al.,* 186 Fed. 505, 514; *Kelly v. Chicago, etc. Ry. Co.,* 122 Fed. 286, 289; *Steinhauser v. Spraul,* 127 Mo. 541, 27 L. R. A. 441.

As said in *Macutis v. Cudahy Co., supra,* "The consensus of judicial opinion is such that this cannot be a fairly debatable question."

See also 20 A. L. R. 97; 49 *ibid.* 521 and 99 *ibid.* 408.

I (b).

There Is No Proof of Negligence on the Part of Capitol Chevrolet Company; Finding V Has no Substantial Evidentiary Support and Is Contrary to the Evidence.

The trial court did not base its finding on any act of the defendant, Capitol Chevrolet Company, but only from an omission. The trial court based its finding upon the answer to the following query:

> "Does it appear, from a preponderance of the evidence, that defendant warehouseman failed to take reasonable precautions for the prevention of fire and for its extinguishment after it occurred, thereby causing or contributing to the plaintiff's loss?" [R. p. 70.]

The court stated:

> "In my opinion, the evidence fully justifies the inference that Capitol Chevrolet Company failed to take reasonable precautions which proximately contributed to the fire loss. Upon the defendant warehousemen rested the duty of anticipating fire hazards and maintaining proper and preventive lookouts. This is patently obvious when, as here, they stored valuable inflammable material in a wooden structure in a semi-rural area, outside the city limits and too far beyond speedy access of fire fighting equipment." [R. pp. 70-71.]

This statement ignores the legal duty of appellant and the evidence and the factual circumstances of this case. In *Wilson v. Southern Pacific R. R. Co.*, 62 Cal. 164 at 172, the court said:

> "The negligence of the appellant, as the proximate cause of the loss of property by fire, thus became the essential fact to recovery; and the burden of proof

> was upon the plaintiff in the action. It is incumbent on him to prove that the defendant had, by some act of omission, violated some duty by reason of which the fire originated; or that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted, or contributed to cause or permit, the fire by which the property was destroyed."

The evidence is undisputed that the tires were stored as the Government wanted them stored, and that under the ordinary circumstances as viewed by reasonable and prudent persons they were in a reasonably safe place, and that there was no risk of fire. The character of the place thus selected by the Government itself and provided by the appellant for the storage of the property; the character of the storage which the Government sought in this matter and the precaution taken by way of having a watchman present twenty-four hours a day; the presence of fire hydrants, and all of the circumstances show that the appellant exercised the ordinary care required of him under all of the circumstances of this case. The court could only reach Finding V which follows this opinion by ignoring the clear evidence in this case which is as follows:

1. It was the Government that was looking for a place to store the tires and it had difficulty finding one.

2. The place selected was the Government's selection not the defendants.

3. The defendants only picked the place because the Government had selected it as the site and because it had Government approval with full knowledge of all the surrounding conditions.

4. As a matter of fact, the location was away from other hazardous buildings and places which ordinarily might be set afire and away from places where the damage might be anticipated.

5. The place was equipped with water fixtures.

6. The firm of watchmen selected and approved by the Government was constantly watching the place.

7. The Exhibits on page 337 shows fire hydrants at four corners of the building.

8. Appellant Capitol Chevrolet Company did all that was required of it to store and safeguard the tires. It acted as a reasonably prudent person or corporation would do under the same or similar circumstances.

9. It could not be reasonably anticipated that fire would occur.

We will detail each of these and other matters further hereinafter.

The responsibility of appellant under this contract was governed by the standards governing warehouses in California [R. 314]. Appellant was not an insurer of the goods. Paragraph 11 [R. 313] relieves either principal.

Under the standard set out in all of the California cases the burden of showing negligence and that such negligence was the cause of the fire rested upon the plaintiff. This burden was not met.

Negligence is the failure to do what a reasonably prudent person would do under all of the same or similar circumstances. Certainly Capitol Chevrolet Company comported with this standard.

Finding V reads as follows:

> "On April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire." [R. pp. 80-81.]

Only by disregarding undisputed competent testimony of witnesses, the legal effect of contractual documents, and the applicable law is it possible to sustain the above finding as it pertains to this appellant.

In reference to the Capitol Chevrolet Company, the opinion reads:

> "Furthermore the evidence discloses that Capitol Chevrolet Company failed to have anyone at the warehouse premises to keep a lookout for possible fires or fire hazards and do whatever was reasonably required to guard against such occurrences. No inquiry was made, when McGrew was permitted to enter the premises, as to his intentions and mode of procedure. Nor did Capitol Chevrolet Company ascertain, after McGrew's entrance, what he was actually doing, although at the time of the fire, he had already been using the torch the day previous and

> during the morning of the day of the fire. This, despite the fact that his torch and welding equipment were in plain sight outside the engine room. Also, it appears that there was no fire fighting equipment available at the premises with which a fire, such as the one McGrew started, could have been combatted." [R. pp. 70-71.]

The opinion in addition to the matters above quoted reads:

> "There remains to be determined whether there is direct liability of Capitol Chevrolet Company to plaintiff. It cannot be disputed that Capitol Chevrolet Company accepted the tires for storage. Thereby it became a bailee for hire for the benefit of plaintiff. And there then rested upon it the legal duty toward the plaintiff to use due care for the preservation of plaintiff's property." [R. p. 72-73.]

and

> "Capitol Chevrolet Company is not excused because its principal is liable, for it is its statutory and common law duty as well as its contract obligation which subjects it to liability." (Citing cases.) [R. p. 73.]

But none of these authorities hold that a person in the position of appellant is either negligent or liable under any circumstances even remotely like the case at bar.

In charging appellant with negligence in having "stored valuable inflammable material in a wooden structure in a semi-rural area, outside the city limits and too far beyond speedy access of fire fighting equipment", the court assumes conditions contrary to the evidence and to admissions of plaintiff's counsel made during the trial.

The language of the opinion entirely ignores exceptional features of the instant storage arrangement which when understood and considered render the above statement a factual and legal absurdity.

No one who is unacquainted with the evidence in this case, and who reads the court's last quoted statement would dream it possible that the Defense Supplies Corporation had selected the Ice Palace as a desirable storage warehouse before the Chevrolet Company sought to lease it, and that prior to the leasing said corporation "authorized appellant" to enter into a lease and use these premises for storage purposes", and for "storing these tires".

However, plaintiff's counsel, Mr. Miller so stated and said, "we are not going to contend or attempt to show that did not take place." [R. pp. 9, 111.]

Yet the court strongly implies that appellant, having a wooden warehouse in an outlying area, took it upon itself to receive in the ordinary course of its business "valuable inflammable material" from a depositor who relied entirely upon appellant's judgment as to the safety of the place, and in this manner delivered said material for storage. According to Mr. Miller's frank statements to the court, and approval of statements by counsel for the Lawrence Warehouse Company, plaintiffs employed an agent whose business it was to locate suitable storage places, and, among others he picked out the Ice Palace.

Prior to that plaintiff had made arrangements with the Lawrence Company through a "kind of Master Contract" to enter into agreements of the type shown herein in Exhibit 1, it being understood that it would, under agreements approved by plaintiff entered into agency agree-

ments in the form of its agreement with appellant, being Exhibit 11. [R. p. 341.]

Mr. Henry described the building as follows:

> "The main building consisted of a frame building approximately 200 feet wide and 400 feet long, and at the end of the building there was a refrigeration room where the motors and the refrigerators were operated, and that building was approximately 25 to 30 feet wide—about 25 feet wide and about 40 feet long, approximately, and it was separated from the main building by a concrete wall, and had a fire-proofed roof on it, and it had steel girders, and a concrete floor; and between this refrigeration room and the main building there was a fire door. That is about the characteristics of the building." [R. pp. 160, 161.]

The map [R. p. 337] shows a fire hydrant at each corner of the building. No one testified that these hydrants were not available or properly equipped.

The District Judge erred in concluding, as a matter of law, that it could reasonably be anticipated that the location and the building was such that it required other protection than a twenty-four hour lookout and guard by the Burns Agency men, together with the exclusion of everyone from entrance thereto except those on its list, and plus the four fire hydrants.

It has been pointed out that the opinion relies upon certain, cited authorities, as well as California Civil Code Section 1814 in holding that since appellant was a bailee "it owed the legal duty toward plaintiff to use due care for the preservation of plaintiff's property" and "is not excused because its principal is liable, for the statutory and

common law duty as well as its contract obligation subjects it to liability."

Let us pass to the next alleged negligent omission of duty.

The opinion declares that appellant "failed to have anyone at the warehouse premises to keep a lookout for possible fires or fire hazards" to do "whatever was reasonably required to guard against such occurrences."

From this assertion, surely no one would suspect that the plaintiff itself had undertaken by a kind of joint custodianship with its agent the Lawrence Warehouse Company to provide its own guards and lookouts, and that in this way it maintained a twenty-four hour continuous safeguard of its valuable property in the wooden warehouse of its own selection. But this is the situation which the record shows, and thus the opinion and the evidence are as far apart as two disassociated and conflicting concepts can be.

W. R. Kissell testified that he was employed by the Burns Detective Agency as a watchman at the Ice Palace. That he received his instructions from Mr. Burns or Mr. Harris of that agency. [R. p. 279.]

Counsel for plaintiff stipulated:

> "That the guards were employees of the Burns Detective Agency; that arrangements were made with the Burns Detective Agency by the Lawrence Warehouse Company at the request of the Defense Supplies Corporation; that the Burns Detective Agency was paid by Lawrence Warehouse Company, and that Defense Supplies Corporation reimbursed the Lawrence Warehouse Company for the cost of the guard service."

He also said: "We will stipulate the RFC approved the Burns Detective Agency as an agency." [R. p. 285.]

Mr. Kissell also testified that he was in no way employed by the Capitol Chevrolet Company, and that "they had no authority 'over him' whatsoever." [R. p. 286.]

He said that Mr. Harris furnished him with a list of the persons who were eligible to go into the building. [R. p. 288.]

The witness said that there were two other watchmen, and he was the one on duty at the time of the fire. He worked from eight o'clock a.m. until four p. m. [R. p. 294.]

The stipulation of plaintiff's counsel, alone, warranted the statement which has been made concerning the arrangements between plaintiff and the Lawrence Warehouse Company, and it proves that, as far as guarding the warehouse was concerned, plaintiff, alone, or plaintiff and the Lawrence Warehouse Company were the actual custodians of the tires and tubes.

The District Judge's opinion assumed otherwise.

By this procedure, many difficult questions were bypassed, such as the much briefed burden of proof issue, as well as scrutiny of the unusual divided custodianship and other qualifications of the warehousemen's responsibilities as fixed by said code provision.

However, *the custodianship was divided.* In a note to the opinion, it is said that "the evidence indicates that the armed guard service was a purely additional and independent protective activity to prevent pilferage of the tires." There is not even a shred of evidence in the record

to show that the guards were placed at the warehouse for the limited purpose of preventing pilferage, or that it was an "additional and independent activity" on the part of the Defense Supplies Corporation.

The plain and only import of Mr. Miller's stipulation is that appellee herein saw fit to choose and designate who the Lawrence Company should employ to guard the valuable property entrusted to it, and considered the matter of such importance that it agreed to reimburse the Lawrence Warehouse Company for the superior policing services of the Burns Agency.

Surely, Mr. Kissell would not be expected, in the performance of his duties, to stand idly by while subversive-minded persons sabotaged the entire Ice Palace by blowing it up with dynamite from the outside or by starting a huge conflagration against its wooden sides. Of course, the Burns' men were regular watchmen who maintained a twenty-four hour guard, which is about as complete as the laws of man and nature permit. It is a matter of common knowledge that this is an outstanding detective agency.

It follows that all of the alleged negligent omissions of duty assigned by the District Judge against appellant were actually attributable to appellee or appellee's own watchmen. It was they who failed to discover until the second day of its use the presence of the torch and welding equipment; it was Mr. Kissell who after observing these dangerous instruments in action, merely walked away and permitted their use to continue. [R. 296.] It was Kissell to whom was addressed and presented the note which asked that McGrew be permitted to enter the premises. [R. 339, 280.]

Every omission of performance of a duty enumerated in the opinion as against appellant is comprehended in those which have been exploded and left harmless, namely the several failures, to-wit, to have anyone at the warehouse to keep a lookout, failure to refuse admission to McGrew and his torch and failure to discover it, and the original failure to store the article in a safe storehouse, in a proper location.

Within the last named negligent omission should be included the fire fighting equipment available at the premises, which the court said "appears" not to have been present.

This negligence, if it be such, is clearly attributable to plaintiff and its officers, who found and selected the Ice Palace and brought about the leasing thereof by the Chevrolet Company. They, of course, observed that the Ice Palace was "wooden" and that it was in a "semi-rural area" and "outside the city limits and too far beyond speedy access of fire fighting equipment."

Also, the appellee's immediate agent, must have noted that "there was no fire fighting equipment available at the premises."

In spite of these conditions, Appellee encouraged and approved the leasing of the Ice Palace, and who can say and how can a court take judicial knowledge that appellee and its agent did not wisely exercise their judgment and discretion.

The location of the Ice Palace had obvious advantages. It was well isolated from other buildings or inflammable matter, which are commonly known to constitute the greatest of hazards.

Mr. Kissell testified that "The space from the highway" on which the warehouse faced was "a clear, open space" in all directions, "to the north"; "to the west and south"; and "to the south there is a large field there." [R. p. 299.]

This is a concrete example of how great an error in law may result from error arising from failure to observe the undisputed facts. As has been shown, the conceded and stipulated facts show that the Ice Palace Warehouse was conducted under the divided control of appellant, the Lawrence Warehouse Company and appellee, and that with respect to safe-guarding the stored articles, appellee retained the principal, if not the exclusive control.

Attention is now directed to the decisions cited in said opinion as above mentioned. From *Franklin v. May Department Store,* 25 Fed. Supp. 735, the only Federal case in the list, we shall quote at some length. The Department Store, and its manager, Saifer, were sued for injuries to the plaintiff's wife, the complaint charging nine omissions to perform duties alleged to be owing to their customers. The opinion states:

> "The motion to remand is based upon the assumption that the petition states a cause of action against the resident defendant Saifer. If the above quoted language fairly implies that Saifer had complete and exclusive authority over the management (*Orcutt v. Century Bldg. Co., et al.,* 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. N. S., 929) or control (*Lambert v. Jones,* 339 Mo. 677, 98 S. W. (2d) 752) of the building plaintiff's position is well taken. It will be noted that the language used does not allege complete and exclusive management or control in Saifer but to the contrary states that the corporate defendant is operating the building. True, it is alleged that the

> Corporation is operating the building through its agents and representatives, but such an allegation implies control by the Corporation of the "agents and representatives" rather than that exclusive control was vested in one particular agent. Fairly interpreted the meaning of the petition is in substance that the corporate defendant was managing and controlling the operation and maintenance of the building and door in question and that the defendant Saifer was its employee "in charge of the use, operation and maintenance" of the door under the managing direction of the corporate defendant. Under these circumstances the petition charges only non-feasance on the part of Saifer. Nowhere is it alleged that Saifer was guilty of active negligence as distinguished from non-feasance. See *State ex rel. Hancock v. Falkenhainer,* 316 Ni, 65km 28k S. W. 466. There can be no recovery from an agent or servant for non-feasance alone unless the agent has assumed and actually commenced such a complete and exclusive control of management or operation as to warrant saying that he failed in discharging or completing a duty theretofore assumed and commenced."

In the instant case the Chevrolet Company was not even an agent of the plaintiff, but this lack of relationship presents an additional but kindred ground for the invalidity of the judgment which has been argued in this brief.

It is certain that under the doctrine of the *May Department Store* case appellant has no liability, for, as has been shown, because the selection of the Ice Palace as a suitable warehouse and safeguarding of appellees tires and tubes were functions which were undertaken by it.

Appellee called its watchman, Kissell, as a witness. By his undisputed testimony it proved that through the Burns

Detective Agency, the appellee exercised full control of the warehouse in all matters pertaining to safeguarding its goods.

It has been shown that appellee provided its own watchman and thereby maintained a twenty-four hour a day outlook.

Mr. Kissell further testified that the Burns Agency issued the watchmen instructions and that it was their order, "not to let anything be moved from the premises unless there was an order from the Capitol Chevrolet Company." [R. p. 279.]

This can mean only one thing as to where rested the general authority as to the removal of articles from the warehouse. Does one who lodges goods in a warehouse have authority under an ordinary deposit agreement or the applicable law to restrict the removal of any goods except his own therefrom? Of course, the answer is negative.

Hence, the assumption of that right, itself, proves, at least *prima facie,* that appellee had and exercised a power, beyond an additional to safeguarding the premises.

Mr. Kissell's testimony has been quoted by which he swore that the Capitol Chevrolet Company "had no authority . . . whatsoever," over him. [R. p. 286.]

Also, Kissell testified that he had "a list of persons who were eligible to go into the building", which list was given to him by Mr. Harris. [R. p. 288.]

The opinion of the District Court declares that the responsibility of appellant is that provided in Section 1814 of the Civil Code of California: Nowhere in that code is it provided that a warehouseman may not decide who shall

be eligible to and who shall not be eligible to enter his warehouse and who may or may not remove goods therefrom.

These are functions which inhere in Warehouse Management. In this case the depositor had charge of and regulated these matters, and by its orders excluded all persons from the entire warehouse except those placed on an excepted list, and directed its agents to let no one enter except those on such list, or to permit no one to remove goods from the "premises" except on an order of an agency named by it.

The fact that appellee authorized appellant to give such an order no more tends to show that appellant had exclusive control of the warehouse than would a similar authorization of the Federal Reserve Bank or to John Doe. In either case, the power to issue such an authorization necessarily implies an existing total control of the premises by the party who issues it.

Therefore, such power of control belonged to appellee. We proceed now to examine the record for evidence concerning whose negligence, if negligence there was, caused the destruction of appellee's property. On that occasion Mr. Kissell was the watchman on duty and under the orders above mentioned. Mr. Kissell said, "There was an order from the Capitol Chevrolet Company permitting Mr. Henry to remove this stuff from the engine room". [R. p. 280.] He said this was "a card", and that it said "there would be men there in order to take that steel out of the engine room. That was all there was to it." He said the card was burned in the fire. [R. p. 287.]

Gordon Kenyon, an officer of the Chevrolet Company gave testimony, not inconsistent with that of the watchman, clarifying the matter of the card.

The witness testified that Mr. McGrew asked him to o. k. permission to enter the Ice Palace; that he thought "the card was from Clyde Henry—it was signed by Mr. Henry; that the card showed the man's name was Mr. Sanchez" who presented it to Kenyon, and he "did not know otherwise."

The witness said that either by telephone or in writing he instructed the guard at the Ice Palace to permit Mr. Sanchez to go into the premises and remove equipment. [R. p. 186.]

Kenyon then identified a card as the one which was presented to him. It was marked Plaintiff's Exhibit No. 8 in evidence. [R. p. 187.] This exhibit reads:

"Home Office and Plant
921 Del Paso Blvd.
Sacramento, California
Tel: 9-3045

U. S. Machinery Company
1568 Russ Building
San Francisco, California

Clyde W. Henry — Tel: DOuglas 7327
Sacramento, Calif.

To Watchman at Ice Palace:

Please allow bearer, Mr. Tony Sanchez, to enter with his two men to remove pipe & equipment.

(s) Clyde Henry.

[Endorsed]: Filed Feb. 13, 1945." [R. p. 339.]

Mr. Kenyon said the list of persons who were authorized to go upon the premises is shown on Plaintiff's Exhibit 10, which was also placed in evidence after being produced by appellant's counsel and identified as having been received by Kenyon. [R. p. 199.] It reads:

"Men Eligible to Enter D S C Warehouse

Jas. A. Kenyon, Pes.
H. C. Gerhart, Warehouseman
A. Koletyke, Chief Tire Appraiser
Mr. Turner, Realtor
Mr. Henry, Part Owner
Mr. Petrillo, Part Owner
G. A. Kenyon, Supervisor
Tire Pilers & Stackers

George Forshay
Dale Borden
G. E. Allison
Melvin Parr
Don Cole
Louis Hill
Edward Schubert
Dale Wilson
George Shaw

[Endorsed]: Filed U. S. D. C. Feb. 13, 1945
[Endorsed]: Filed U. S. D. C. Sept. 4, 1946."
[R. pp. 340-341.]

The witness, also, said he received a letter which is "Plaintiff's Exhibit 9". It reads:

"Dear Mr. Kenyon:

You are requested not to permit anyone to enter the warehouse premises where tires are stored for account of this corporation for any reason whatsoever, other than authorized appraisers or properly identified employees of this corporation.

In the near future, however, you may be called upon by a representative of the Rubber Manufacturers Association of America, Inc., which organization is to handle the distribution of the tires acquired by us, and upon proper identification from such representative entrance to the warehouse and examination of any tires may be permitted. Your strict observance of the above will be appreciated.

Very truly yours,
F. J. Titgen, Agent." [R. p. 192.]

In *Brady v. Southern Co.,* 320 U. S. 476, the Supreme Court quoted with approval from *Milwaukee & St. P. R. Co. v. Kellogg,* 94 U. S. 469 at 475, as follows:

> "'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'"

The court then says in the *Brady* case:

> "Events too remote to require reasonable prevision need not be anticipated."

There is absolutely nothing in the evidence in the case at bar to show negligence on the part of the Capitol Chevrolet Co. or an act amounting to wanton wrong which proximately caused the injury nor could appellant by reasonable prevision have foreseen any of the events.

Furthermore, the cause of the fire is not clear. The plaintiff's own witness, by which it is bound, did not establish the cause of the fire but the court assumed that the cause was nevertheless reasonably inferable from his testimony. However, his testimony denied positively that he caused the fire and such an inference is not legally permissible or logical.

I (c).

The Plaintiff Was Guilty of Contributory Negligence.

If the defendants were negligent the plaintiff was necessarily guilty of contributory negligence. It was the plaintiff which picked the location and selected the watchmen.

It is settled law that in warehouse cases as in any others wherein negligence is an issue, proof of contributory negligence is a complete defense. (27 R. C. L. p. 991.)

One precedent has been found which bears a striking resemblance to the instant case.

In *Smith v. Frost,* 51 Ga. 336, Smith had stored cotton in Frost's warehouse. This was during the civil war. The confederate authorities took the warehouse for a hospital and threw the cotton into the street. It was seen there by the defendant and probably by Smith, the opinion states, and it was held that if plaintiff knew or had reason to believe "that it had been so thrown and could have saved" by him "by the exercise of ordinary care" he could not recover.

It has many times been held that inspection by the bailor of a building where storage is without contract, for the express purpose of judging its suitability for storage of his goods relieves the warehouseman of responsibility.

Southerland v. Albany, S. & W. Co., A. A. N. Y. Supp. 835;

Gibson v. Hatchett, 24 Ala. 201;

Brown v. Hitchcock, 128 Vt. 452;

Fay & Bates, 99 Mass. 263.

Where the depositor has full knowledge of the particular conditions before storing goods in a warehouse, if due to such conditions they are damaged, his contributory negligence prevents a recovery.

Allen v. Somers, 73 Conn. 355, 52 L. R. A. 106;

Parker v. Union Ice & S. Co., 59 Kan. 626.

II.

The Court Erred in the Admission and Exclusion of Evidence. Proof of the Price Paid for the Tires and Tubes by the Government Was Inadmissible as Evidence of the Value of Such Articles for Several Reasons.

1. None of the defendants, including appellant in particular, participated even remotely in the purchase transactions.

The witness by whom the plaintiff essayed to prove the cost of the destroyed property testified that he had no personal knowledge of the matters which he related concerning that subject and that his testimony was based solely on his memory of the contents of documents prepared by others, which were not produced in court, but it would have been inconvenient to do so.

Hence, such testimony was double-hearsay. The documents themselves would have been hearsay, and Mr. McClellan's hearsay testimony was based on such unsworn hearsay documents.

2. The sales were made under compulsion and the tire owners were compelled to accept the prices perfunctorily offered them by plaintiff, and purchases so made and prices so fixed, morally, logically and legally are devoid of evidentuary value as proof of the fair market value of the articles involved.

1. The Applicability of the Hearsay Rule Will Now Be Shown.

The courts will not receive the testimony of a witness as to what some other person told him as evidence of the fact asserted. The rule of exclusion is the same whether the evidence offered consists of statements purporting to

be based on the declarant's own knowledge or whether his statements are sworn or unsworn, oral or written.

31 C. J. S. p. 919.

Wigmore says: "The essential requirement of the hearsay rule, as just examined, is that statements offered testimonially must be subjected to the test of cross-examination." The right, as safeguarded by the hearsay rule this learned authority regards as entitled to esteem "next to jury trial, the greatest contribution" to the anglo-American law of evidence.

V. Wigmore on Evidence (3d Ed.) p. 27.

Greenleaf on Evidence, "the old reliable", asserts: "The hearsay rule is constantly expounded as 'the general rule of not receiving evidence unless upon oath and with the opportunity of cross-examination." Quoting eminent authorities, Greenleaf shows that the rule is fundamental and not technical and that it precludes hearsay evidence from one not a party to the suit from being related by a witness because the declarant could not be cross-examined.

1 Greenleaf on Evidence (16th Ed.) pp. 183-185.

All authorities agreed that hearsay evidence is incompetent and wholly inadmissible unless there is a recognized exception to the rule which covers the case.

"The rule excluding hearsay is a basic rather than a technical rule."

31 *C. J. S.* p. 924.

The evidence of which complaint is made as violative of the hearsay rule in this case is unquestionably hearsay. Appellant's counsel knows of no exception which covers it

and the record fails to reveal the theory on which such evidence was considered within some exception either by plaintiff or the court, nor does the opinion of the trial judge mention this question.

Mere recital of the evidence in question will suffice to establish its hearsay character, in fact much of it is double-hearsay.

The hearsay rule is so clear and well understood that instances of double-hearsay evidence being received or produced are infrequent.

However, cases involving unsworn hearsay writings, themselves, are not difficult to find.

The following are applicable by analogy:

In *Ogilvie v. Aetna L. Ins. Co.,* 189 Cal. 406, it was held that the written report and findings of the County Autopsy Surgeon to the Coroner was hearsay and incompetent. The action was on a policy insuring against bodily disability by certain means.

In *Pierce v. Patterson,* 50 Cal. App. (2d) 486, a malpractice suit, it was held unnecessary to decide whether County Hospital records of the case were hearsay. The opinion states that they were properly excluded as it was not shown that such records "were required to be kept by law."

In the instant case no attempt was made to show that the unidentified records of the Defense Supplies Corporation, to which Mr. McClellan said he had access, [R. p. 113], were required to be kept by law. Mr. McClellan made a written memorandum from said records on which he relied in testifying. [R. p. 124.]

In *Lusardi v. Prukop,* 116 Cal. App. 506, an action for damages for personal injuries, records of an emergency hospital were held to be hearsay and improperly admitted. No foundation was laid to show that the entries were made in the performance of a duty enjoined by law, and this to bring them within the exception to the hearsay rule provided in Section 1926 of the State Code of Civil Procedure.

It is said: "The hearsay rule is applicable to written instruments as well as to oral statements (10 *Cal. Jur.* p. 1039). Testimony based upon memoranda made by others when the witness has no knowledge of the facts except from such memoranda is hearsay evidence", citing cases.

Since appellant was not a party to it, the verdict of a Coroner's inquisition was held inadmissible hearsay in *Estate of Dolbeer,* 149 Cal. 573.

To the same effect are *Mar Shee v. Maryland Assurance Co.,* 190 Cal. 1, 3, and *Hollister v. Cordero,* 76 Cal. 649.

In *Holland v. Kelly,* 74 Cal. App. 576, delivery tags purporting to record deliveries of liquor by a liquor dealer were erroneously admitted in evidence. The opinion states that they were made without the knowledge of the plaintiff and were unsworn statements of a person not a witness or subjected to cross-examination, and, therefore, hearsay and incompetent.

In the *Lusardi v. Prukop* case, the court said:

> "The proffered evidence was hearsay, concerning which Greenleaf on Evidence, volume 1, section 99, says: 'Hearsay evidence, as thus described, is uniformly held incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses, who can speak from their own knowledge.' "

In the instant case the facts set forth in plaintiff's records, a memorandum from which was the basis of Mr. McClellan's testimony, were susceptible of being proved by witnesses who could speak from their own knowledge.

Upon the same ground, where the owner did not participate in the assessment, the assessed valuation of property has been almost universally held inadmissible to prove its value for any other than tax purposes in any suit to which the owner is not a party.

San Jose & A. R. Co. v. Mayne, 83 Cal. 566;
Bartlesville Interurban Ry. Co. v. Quaid, 151 Pac. 891 (Okla.), L. R. A. 1918A, 653;
Denver R. Co. v. Heckman, 45 Colo. 470;
Oldenberg v. Oregon, Sugar Co., 39 Ore. 564;
Lewis v. Englewood Elev. etc. Co., 223 Ill. 223;
Shea v. Boston etc. R. Co., 217 Mass. 163;
Calahan v. Dunker, 51 Ind. App. 436;
Kelly v. People's Nat. Ins. Co., 262 Ill. 158;
Hanover Water Co. v. Ashland Iron Co., 84 Pa. 279;
Carper v. Risdon, 19 Colo. App. 530 (conversion);
Starrs v. Robinson, 74 Conn. 443;
Anthony v. New York etc. Co., 162 Mass. 60;
American State Bk. v. Butts, 111 Wash. 612;
Putnam v. White, 88 So. 355, (Ala.);
Con. v. Tryon, 31 Pa. S. Ct. 146;
Ridley v. Seaboard etc. R. Co., 124 N. C. 37;
Girard Tr. Co. v. Philadelphia, 248 Pa. 179;
Re Northlake Ave., 96 Wash. 344;
Dudley v. Minn. etc. Co., 77 Ia. 408;
McNulty v. Lawley, 42 Cal. App. 747;
Yolo K. & P. Co. v. Edmonds, 50 Cal. App. 444.

As said in *Scott v. O'Neil,* 23 Ky. L. Rep. 331, 62 S. W. 1042, "The evidence of what the property was valued at in assessment for taxation was wholly irrelevant. It was but hearsay; the opinion of the assessor or of the taxpayer, given out of court and with no opportunity for cross-examination." (See, also, 5 *Nichols Applied Evi.* p. 4579.)

2. **The Court Erred in Receiving in Evidence Testimony Based on Documents Purporting to Show Prices Paid by Plaintiff for the Articles Destroyed, Because the Sales Were Coerced and Forced.**

The tires and tubes were not sold to plaintiffs in an open market. The prices were not accepted by the sellers voluntarily and in the exercise of free will.

The real purchaser was the United States Government and it had previously excluded all would-be or possible competitors from the market, and had fixed its own price and, by implication of law, had declared to all who owned such articles: You must not keep them whether you can use them or not and unless you sell them to me at the prices I offer, you cannot sell them at all.

The plaintiff's witnesses fully recognized this situation; it is a matter of common knowledge and of law.

The laws which accomplished this taking of property, probable without due process, were warranted by the necessities of the war and the Government's war powers. However, this was true, not because the United States even under such powers could indiscriminately take people's property arbitrarily or capriciously, but for the sole reason that rubber was direly needed in the war struggle.

A different situation exists when, the needed rubber having been burned, the Government, in an ordinary civil suit to recoup its loss, asks a court for judgment for the value of the rubber.

Now no impelling necessity gives the United States or one of its corporate bureaus exemptions, priorities or rights to short-cuts not possessed by any other corporation or other litigant.

Appellant insists that without the invention of some judicial theory unknown and foreign to established principles and rules of evidence, by reason of legal and factual conditions created by the Government, it is probably precluded from any, except a nominal judgment in cases of the nature of this, and it certainly is so precluded by the record in the instant case.

The court erred in receiving evidence testimony based on documents purporting to show prices paid by plaintiff for the articles destroyed, because the sales were coerced and forced. The price paid does not tend to establish market value and plaintiff's evidence shows that the sales herein involved were not according to market value.

In this case plaintiff's counsel proceeded on the theory that market value could not be proved and, therefore, that any other evidence relevant to the value issue was competent and admissible, and that the evidence showing the cost of personal property to the owner, although not conclusive is relevant, where the property has no market value.

These general rules presuppose that the dealings involved are normal. Market value is the fair price paid in the open market[1] where buyer and seller bargain on equal terms and agreements reached are voluntary.[2]

Appellant maintains that this fundamental principle likewise conditions the competency of evidence as to cost, which, if received is admitted as secondary evidence of market value. (*John Mouat L. Co. v, Wilmore,* 15 Colo. 136; *Hollinger v. Missouri etc. Ry. Co.,* 94 Kan. 316; *Union Pacific etc. Ry. Co. v. Williams,* 3 Colo. App. 526.)

The evidence of costs was offered in this case upon this theory. Plaintiff's counsel said in that behalf:

> "I think in the absence of market value, any evidence of cost or value is material to determine the loss which the plaintiff suffered in the destruction of these tires. In the finding of market value the court may consider all possible elements of value, including the cost to the owner of the property." [R. p. 133.]

---

[1]Market value means the price for which an equivalent could be reasonably and fairly purchased at or near the place where the property should have been delivered or where the transaction occurred. *Bullard v. Stone,* 67 Cal. 477; *Shurtleff v. Marcus Land, etc. Co.,* 59 Cal. App. 520; *People v. Schwartz,* 78 Cal. App. 561; 578; *So. Cal. Edison Co. v. Ind. Acc. Com.,* 96 Cal. App. 337. (Cal. C. C. Sec. 3354.)

[2]*Muser v. Magone,* 155 U. S. 240, 39 L. Ed. 135; *State ex rel Highway Com. v. Stoddard Gin Co.,* 62 S. W. (2d) 940 (Mo. App.); *Olson v. U. S.,* 292 U. S. 246, 78 L. Ed. 1236; *Appeal by Borough of Melbourne,* 329 Pa. 321, 198 Atl. 49; *Ins. Co. of N. America v. McGraw,* 255 Ky. 839, 75 S. W. (2d) 518; *River Park Dist. v. Brand,* 327 Ill. 294; 158 N. E. 690; *Packing Co. v. Sunland Sales, etc. Assn.,* 100 Cal. App. 126, 132 (26 Words & Phrases, pp. 565-575.)

However, scores of decisions quoted in Words and Phrases under the caption "Market Value Price at Free Sales" and other captions, *supra,* repeat, as a part of the definition of the term "market value" in substance, that it is "not what the property would bring under a forced sale" but what "a willing owner" who "is not compelled to sell" would take and "one who wants to purchase under ordinary curcumstances" would be willing to pay.

It is implicit in all of these decisions that, as expressly stated in *Wall v. United Gas etc. Co.,* 178, La. 908, 152 So. 561, market value is not a price arbitrarily fixed by one party but is the actual price at which a given commodity is currently sold "in the usual and ordinary course of trade and competition between sellers and buyers equally free to bargain," etc.

It is safe to say that no reputable authority can be produced which maintains that value (whether established by evidence of "market value", or, in lieu thereof, by proof of cost, sales of similar articles or other means), can be proved by evidence based upon coerced sales or other transactions.

In the instant case the plaintiff's own witness established the fact that the tires and tubes herein involved were purchased from owners who sold under compulsion and at prices arbitrarily fixed by the real purchaser, the United States Government.

Plaintiffs Uncertainty as to Following Its Own Program Adds to the Conjectural Character of Its Proof.

It was shown that the price list which McClellan produced as the list given the appraisers, and which he claimed followed OPA ceiling prices [R. pp. 133-135] differed from the OPA ceiling price.

Appellant's counsel introduced in evidence "Defendant's Exhibit 13" which purports to be the OPA Price Regulation showing ceiling prices for tires. [R. p. 301.]

This regulation as compared with the list of prices set forth in Plaintiff's Exhibit 4, being a schedule of prices to be paid for used tires differs in that Plaintiff's Exhibit 4, Grade 4, prices the tires at $2.75 each, whereas the OPA Regulation price for the same tires was $1.50 each. [R. pp. 303, 304.]

Defendant's Exhibit B shows the dates of issuance of OPA price lists as December 30, 1941, March 7, 1942 and January 31, 1942.

The purchases of tires by plaintiff were said by its counsel to have been made on October 15, 1942 [R. p. 306]. Hence, the OPA schedule dated March 7, 1942, applied to plaintiff's purchases, and the price above stated of $1.50 per tire was the OPA ceiling price.

Conflict Between Buying and Selling Prices.

Another factor, and one which not only adds another contingency to the possible dependability of Mr. McClellan's testimony as to prices actually paid for tires, but renders his averages uncertain and conjectural, was developed in cross-examination.

It must be remembered that in plaintiff's attempt to prove damages the theory followed, as announced by Mr. Miller early in the trial, was, that being unable to prove market value, the prices paid for articles destroyed, arrived at by averaging the prices paid for such articles in the entire area, would be produced and relied upon as establishing "what they were actually worth, because they did have a value." [R. p. 118.]

If Damages Are Possible at All They Could Only Be Nominal Damages Under the Evidence.

Mr. McClellan said The Idle Tires Program started, officially, on October 15, 1942. [R. p. 141.]

Plaintiff witness McClellan testified on direct examination that the purpose of The Idle Tires Program was to obtain control of all waste rubber in the United States; that owners of tires could not sell them to other persons; that "they were required to sell them to the Government; that the prices were fixed by the government; that the maximum number they could retain was five." [R. pp. 127, 128.]

On cross-examination by Mr. Wallace for the Lawrence Warehouse Company, Mr. McClellan testified that the appraisals of the tires was done by "appraisers appointed by us," and with this matter the warehouse company had nothing to do [Rep. Tr. p. 147]; and the witness said that these appraisers "appraised and graded these tires." [R. p. 151, lines 9-11.]

By the foregoing testimony, the plaintiff proved:

1. That at the time when plaintiff purchased the tires and tubes destroyed by the fire, alleged to have been the

result of defendants' negligence, by reason of the O.P.A. Regulations these articles had no market value.

2. That owners of tires could not sell such articles except to the United States Government.

3. That such owners were not free to bargain and had no power to fix the price and could not participate in that matter.

4. That such owners were compelled to sell all tires owned by them in excess of five for one automobile.

5. That the prices for which owners must sell were arrived at by following O.P.A. ceiling prices, established according to grade, and by the plaintiff's appraisers, who graded the tires.

6. That, as far as any owner having any voice in selling his tires or in arriving at the price to be paid, and the decision to sell, he was a mere interested bystander for these matters were all arbitrarily determined by others, namely the Office of Price Administration and the appraisers of the plaintiff, acting as agents of the Federal Government.

In other words, the owners' property was taken without a hearing, without opportunity to cross-examine any witness or refute any evidence, oral or written, upon which the price-fixers may have relied, and he was compelled to sell.

The procedure is unique but most resembles condemnation of property minus the hearing and with the unbridled power of the Government to fix the prices superimposed.

The compensatory judgment in this case is founded upon cost prices so established.

Appellant insists that the concept that a judgment so sustained is lawful is preposterous and cannot be legally justified for the following reasons:

1. It is the universally recognized rule that prices paid for property of any kind at forced sale is incompetent and inadmissible as evidence of market value or of actual value.

In addition to the fact that the definition of the term "market value" as announced in substantially all of the applicable decisions, expressly excludes prices at forced sale, we find many cases directly holding as above stated, among which are the following:

Willamet Falls C. & L. Co. v. Kelly, 3 Ore. 99;

Madisonville, etc. R. Co. v. Ross, 126 Ky. 138, 13 L. R. A., N. S. 420;

Chase v. City of Portland, 86 Me. 367;

St. Louis K & A Ry Co. v. Chapman, 38 Kan. 307;

Pittsburgh V. & C. Ry. Co. v. Vance, 115 Pa. 325;

Wagner & C. v. Dunham, 246 S. W. 1004 (Tex.);

Clark v. Logan Mut. L & B Co., 58 Ill. App. 131;

Wall v. United Gas Publ. Ser. Co., 178 La. 908;

San Diego Land & Town Co. v. Neale, 78 Cal. 63, 3 L. R. A. 83;

Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 4 Am. St. Rep. 51;

Helvering v. New President Corp., 122 F. (2d) 92, 97;

Metropolitan Water Dist. v. Adams, 99 P. (2d) 659;

Appeal of Pitney, 20 N. J. Misc. 448, 28 A. (2d) 660, 666.

In the *Little Rock v. Woodruff* case, *supra,* it is said:

> "And when we say that the owner is entitled to receive the price for which he could sell the property, we do not mean the price he would realize at a forced sale on short notice, but the price that he could obtain after reasonable and ample time such as would ordinarily be taken by an owner to make sale of like property."

In *Helvering v. New President Corp., supra,* the court held inadmissible evidence of the price paid at a foreclosure sale, saying that such a sale "is no criterion of 'market value.' "

In *Appeal of Pitney, supra,* it was held that market value is not "what the property would bring at auction under the hammer" nor "a value obtained from the necessities of another."

2. A second reason supports the one above elucidated as persuasive that the evidence of cost to the plaintiff was incompetent.

The *sales* and *purchases* of these tires and tubes must be classed as contract transactions. Yet owners were compelled to give up their property and accept prices, not offered, but dictated to them.

It must be remembered that we do not question the legality of such procedure *"in aid of the war."*

We do challenge the use of prices so established as evidence of the fair market value of the property thus seized, bearing in mind that for evasion, secreting or refusal to give up the tires herein involved, every owner would have been punishable by fine or imprisonment or both. Even a threat of a well founded prosecution against

a criminal to compel him to carry out an agreement or to make a conveyance is duress, and a contract made as the result of such threat, is void.

(See V. Williston and Thompson on Contracts, p. 4512 and columns of cases there cited.)

In *Meyer v. Guardian Trust Co.,* 296 Fed. 789, it is said:

> "Unlawful duress is a good defense to a contract, if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness."

(See also *Barnett Oil & Gas Co., v. New Martinsville Oil Co.,* (D. C.) 254 Fed. 481; *Galusha v. Sherman,* 105 Wis. 263, 47 L. R. A. 417, 81 N. W. 495; *Schultz v. Catlin,* 78 Wis. 611, 47 N. W. 946; *Hullhorst v. Sharner,* 15 Neb. 57, 17 N. W. 259; *Morrill v. Nightingale,* 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068; *Morrison v. Faulkener,* 84 Tex. 128, 15 S. W. 797; *Thompson v. Niggley,* 53 Kan. 664, 26 L. R. A. 803, 35 Pac. 290; also 2 Greenl. Ev., 14th ed. note to sec. 301; Joyce, Defense to Commercial Paper, sec. 105.)

To the same effect, reviewing many decisions, is *Colby v. Title Ins. & Trust Co.,* 160 Cal. 632.

In each of these cases documents were held void which had been executed under threats of prosecution of the maker's relative for a crime of which he was guilty, because as said in the *Colby* case,[a] under such circumstances "the obligor is not a free agent" and "is not equal to the task of protecting himself."

The bearing of the foregoing authorities concerning the effect of duress or coercion on the validity of contracts upon the issue now being presented is the obvious incongruity of holding, as the trial court has herein, that prices paid to sellers who were compelled by law to sell to the purchaser and to accept the prices fixed by it are evidence that such prices are *fair* and show the value which a seller *who wants to sell but is not compelled to do so, and is free to bargain,* would accept, and which a buyer who desires to purchase but holds no bludgeon with which to coerce acceptance of his terms, would offer, namely market value, although in this case the owners of the articles had no choice and no volition—not even as much as the victims of duress in the Colby and Myers appeals and many cases cited in the opinions therein.

Also, this line of authority concurs in principle with, and emphasizes the applicability to the instant case of others previously mentioned herein which hold directly that the price for which property sold at forced sale is inadmissible as proof of its market value or actual value.

The circumstances of the sales through which plaintiff acquired the tires and tubes involved in this case are the very antitheses of those required for the ascertainment of their values.

To be competent evidence of such values it is fundamental that the sale be voluntary; there must be no force or coercion; it must be an open market sale where competition is possibe; opportunity must exist for bargaining whereby the seller may exhibit all of the advantages possessed by his property and the purchaser may advance reasons in justification of his offer; no extraordinary conditions may have induced such a sale. It must be in the "ordinary"

course of trading; speculative considerations may not be regarded to unduly enhance the price nor may the necessities of the seller avail to depreciate it.

The instant sales were not voluntary; the force and coercion of the law and the power of the O.P.A. and the plaintiff's appraisers compelled them; no open market existed. Such markets were outlawed by law; bargaining, also, was rendered impossible by law; these conditions were extraordinary and unparalleled.

From the foregoing comparison it is apparent that the vice of the use in the instant case of evidence of cost to the plaintiff as proof of market value, and thus as the measure of damages, is not that the defendants were necessarily damaged, but that such evidence is wholly incompetent, because it is an illegal and improper basis for the judgment. The evidence should have been stricken on defendants motion, as was held concerning similar incompetent and illegal evidence in *Spring Valley Water Works v. Drinkhouse,* 92 Cal. 528, 533.

Had the motions been granted, only nominal damages could have been awarded, for without the "cost" evidence plaintiff produced no proof of substantial damage.

3. When Damages May Be Proved With Approximate Accuracy They Must Be So Proved.

There is a well recognized qualification to the rule which appellee relied upon to establish damages by any "evidence of value which would tend to aid the court in determining what" the tires and tubes "were actually worth." [R. p. 118.]

This well established qualification is based on the reasonable and fair requirement that one who would enlist the

help of equity or equity to extract him from a dilemma, must show that he has exercised diligence and made every reasonable effort to help himself. This principle, as applied to actions for damages, whether for breach of contract or torts, is expressed in the rule which requires that

> "When compensatory damages are susceptible of proof with approximate accuracy and may be measured with some degree of certainty, they must be so proved." (25 C. J. S. p. 496.)

In the instant case, it is apparent that the plaintiff chose to adopt a lazy man's way of attempting to establish injury and damages. Not having any records, so Mr. Miller claimed, of the tires and tubes actually stored in the Ice Palace Warehouse, at the beginning of the trial, and after Mr. Getz had expressed the view that "the question of damages may be a difficult one", Mr. Miller addressed the court as follows:

> "Mr. Miller: I think that perhaps Mr. Getz is more fearful than I am as to the matter of values; we feel that we can present in rather short testimony evidence that will show the value of the tires that were destroyed. We recognize that there may be a dispute as to the value, but I would like, if you might, to proceed with that testimony." [R. pp. 102, 103.]

Later, Mr. Miller divulged that this "short testimony evidence" method of proving plaintiff's case as to the number of tires destroyed and their cost to the plaintiff, was as shown in his statement as to the records of the Defense Supplies Corporation, as follows:

> "They were appraised before they went in; they do not have the appraisal for these identical tires. They do, however, have records showing the amount paid

by Defense Supplies Corporation for all tires received in Northern California under the Idle Tires Program, including these tires. These figures are by graded tires and scrap tires. We propose to show the total amount paid out by Defense Supplies Corporation for this several hundred thousand tires, I think it will be that many in this area, which included these tires, and by that means and a computation made by this witness, the average value—the average amount paid by the corporation for each graded tire. I do not think there will be any dispute as to scrap tires, because they paid the same for each scrap tire." [R. p. 117.]

Mr. Miller amplified his method of proof further as follows:

"We do not know how many of each grade, but we would like to put in evidence as to the amount the Defense Supplies Corporation paid for all of the tires, a large number in this area. We feel that the average value, the average cost or average amount paid is a fair indication of what the Defense Supplies Corporation paid for these tires." [R. p. 118.]

Mr. McClellan testified that in his position as an employee of the plaintiff, he had access to "all of its records with respect to the tires received by the Idle Tires Program in this District, including Sacramento", and, also, to the records showing "the amount of money paid out" by plaintiff "to owners of these tires." [R. p. 113.]

It developed that the witness McClellan was testifying from a memorandum which he had prepared from the "original records" of the plaintiff which were kept in the Federal Reserve Bank in San Francisco, which he said showed the "number of tires of each grade included in the inventory of graded tires." [R. p. 124.]

McClellan gave the numbers of tires received and the prices paid for them under the Idle Tires Program, for the area of Northern California. [R. pp. 124-126.]

He also testified that he knew that on April 9, 1943, the date of the fire, there were stored in the Ice Palace Warehouse 27,601 automobile tires and 1,850 tubes, but that his only sources of information as to these figures were a letter by Gordon Kenyon of the Capitol Chevrolet Company and a letter from Mr. Hanley of the Lawrence Warehouse Company. [R. p. 111.]

However, the District Court found, as stated in its opinion [R. p. 73] that plaintiff's method of computing its alleged damages was "speculative and therefore legally improper."

Therefore, the opinion looks through the transcript for morsels of evidence to serve as the basis of a judgment "within the boundaries of possibility."

In that behalf the opinion relies upon "the testimony of Alfred D. McClellan and the data contained in Plaintiff's Exhibit No. 3", to establish "the number and classification of the tires and tubes destroyed." [R. p. 74.]

The testimony of Mr. McClellan, to which the opinion refers, is that above set forth, by which the witness admitted that his only knowledge was gained from said Exhibit 3 and the letter from Hanley, so that McClellan's testimony was obviously hearsay and added nothing to the statements of the authors of the letters.

The Hanley letter was not read in evidence nor was it introduced as an Exhibit, and, as has been shown, the statements as to the number of tires and tubes contained in the Kenyon letter was purely hearsay, which fact ap-

pears on the face of the letter [R. p. 320] and by Kenyon's undisputed testimony. [R. pp. 203, 204.]

In arriving at the "fair value" of the tires and tubes, the Court's opinion employs the method of using the very plan which it condemns as "speculative" and "legally improper", to-wit, calculating the value of tires according to the average cost.

However, the Court's method lacks the merit of mathematical computation, and substitutes, pure conjecture in determining the average price paid for the graded tires, which it finds to be $2.75 per tire although the opinion itself shows that "many of the graded tires must have been purchased at less than $2.75" and that all of the graded used tires which required spot repairs cost 90 cents less than $2.75 for each spot and $1.70 less for "reinforcement or sectional repairs" and that many tire owners turned in their "poorest tires".

Hence, the opinion states that these factors "offset" and "reasonably tend to equalize", that to make the average price $2.75 per tire, since "other tires purchased were purchased for more than $2.75".

The opinion also adapts a method of valuation of scrap tubes which is purely speculative. The court reasons that, since there was no evidence as to O. P. A. prices and plaintiff claimed these tubes were worth 20 cents each they were probably depreciated from the value of graded tubes in the same proportion as scrap tires as compared with the value of graded tires, namely 55%. [R. p. 75.]

The amount involved is only $198.00, but the principle employed is clearly unsound, because any one familiar with automobiles and their equipment knows that tubes are made of very different composition rubber than tires

and hence there is no logical basis for the court's assumption.

The purpose for the foregoing recital of plaintiff's attempted proof and the type of evidence relied upon by the court to evaluate plaintiff's alleged damages is to show that no "approximate accuracy" could be attained by either method.

On the other hand, it appears from the record and the testimony of plaintiff's witnesses and the statements of its counsel plaintiff had an available method of proving damages with approximate accuracy.

The two factors involved were the number of tires destroyed, which might have been established almost to the degree of precision, and the value of the tires destroyed, which could have been proved by showing the reasonable market value immediately prior to the date upon which the Idle Tires Program became effective on October 15th, 1942. [R. p. 41.]

WITH REASONABLE INDUSTRY AND ORDINARY BUSINESS ACUMEN THE NUMBER OF TIRES AND THEIR GRADES COULD HAVE BEEN PROVED.

With all of the records of the Plaintiff available, showing exactly how many tires and tubes had been purchased in the entire area, and, of course, recording the warehouse in which each tire and tube had been appraised, and, if removed to another warehouse, in which warehouse the same had been lodged, it would have been a simple although perhaps laborious process to have ascertained how many tires and how many tubes of each grade were, on the date of the fire, stored elsewhere than in the Ice Palace.

These totals having been computed, the difference between the total tires and tubes purchased and said totals

would necessarily have established the number in the Ice Palace on said date, and it was admitted by defendants that everything therein was destroyed by the fire.

Appellant insists that the transcript warrants and requires the inference that plaintiff's records must have contained all of the data necessary to the determination of both the numbers and grades of the tires and tubes and the prices paid by the plaintiff. Mr. Miller stated that the form of contract employed by plaintiff in its agreement with the Lawrence Warehouse Company, was the same as plaintiff used "in all of its agency agreements." [R. p. 110.]

Plaintiff's Exhibit 1, is the Lawrence Warehouse Company agreement. [R. p. 310, *et seq.*]. Among other stipulations within that writing, obligating the company, are the following:

> "You have offered to the Defense Supplies Corporation, which is acting for the United States Government, the facilities of your warehouse for the storage of tires and/or tubes acquired by us under the 'Consumer Tire Purchase Plan'. In order to standardize our records and simplify the procedure under this Plan, you will issue receipts for tires and/or tubes delivered to you for our account by signing the appropriate section of our Form DS-T 24, one of which will accompany each lot of tires and/or tubes delivered to you. Your signature to this receipt will constitute an agreement that the tires and/or tubes are accepted by you for storage in accordance with the following conditions: * * *
>
> 2. Tires and/or tubes stored by you for the account of Defense Supplies Corporation will be segregated from all other such goods in your warehouse, and such records will be kept by you as are necessary

to identify them as the property of Defense Supplies Corporation. [R. pp. 310-311.]

3. Tires and/or tubes delivered to you for our account will be accepted by you and receipts therefor on Form DS-T 24, will be forwarded daily to Federal Reserve Bank of San Francisco, San Francisco, California. [R. p. 311.]

7. Tires and/or tubes stored by you will be delivered on the written order of Defense Supplies Corporation. It is understood that you will not be required to deliver any individual tire and/or tube either by serial number or otherwise, but that upon receipt of an order for delivery you may deliver any tire or tube in storage which is of the size, type, and classification named in order." [R. pp. 312-313.]

Hence, plaintiffs were continually informed of the whereabouts of their tires and tubes.

McClellan testified that the prices paid were the O.P.A. ceiling prices according to the grading by the appraisers, and that the original reports of the appraisers showing the grades and appraiser's evaluation were in plaintiff's possession.

Hence, without resorting to hearsay testimony, or the speculative averages method, or conjectural estimates as to one unknown quantity being an "offset" for another unknown quantity, and without guessing and assuming that two unknown quantities "tend to equalize" each other, both factors essential to establish plaintiff's damages could have been proved.[1]

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[1]Of course appellant is not to be understood as admitting that O.P.A. ceiling prices are competent evidence to prove market value or "fair value" or "actual worth" of these articles, but both plaintiff and the court relied upon said O.P.A. ceilings to prove these inconsistent measures of damage.

III.

In Respect to the Number and Value of the Articles Involved, Finding II of the Finding of Fact Has No Support in the Evidence and Is Contrary to the Evidence.

It has been shown that the testimony of the witness McClellan concerning the sums paid by plaintiff for said articles is incompetent and valueless, and also that all of his testimony upon that question was hearsay.

No other testimony or purported evidence was adduced in plaintiff's attempt to prove substantial damage.

Assuming but not conceding that the finding of the "reasonable worth" of the "tires and tubes" stored in the "Ice Palace" Warehouse, is equivalent to finding the reasonable market value or actual value thereof, that portion of Finding of Fact II, which reads: "Plaintiff at all times mentioned in its complaint herein was the owner of said tires and tubes and entitled to their immediate possession, and said tires and tubes were on April 9, 1943, of the value of said reasonably worth the sum of $41,-975.15." [R. p. 79], is wholly lacking in competent evidentiary support.

For the same reasons that part of Finding II which relates to the number of tires involved is entirely lacking in such evidentiary support. In fact it is almost entirely without support in the evidence, competent or otherwise, and is contrary thereto. This part of Finding II reads:

> "Prior to April 19, 1943, plaintiff delivered to defendant, Lawrence Warehouse Company and to Capitol Chevrolet Company * * * at their warehouse known as the 'Ice Palace' in West Sacramento,

> California, certain quantities of tires and tubes, to-wit, 27,601 tires and 1,850 tubes, for storage and safe keeping."

Even if McClellan's said testimony had not been hearsay and if the evidence offered to prove cost had been competent to prove market value, such testimony is so highly conjectural, contingent and uncertain as to be incompetent. McClellan did not claim that his computations were more than averages based upon speculation.

The pertinent evidence will now be set forth:

A letter written by the Chevrolet Company, dated April 10th, 1943 (after the fire), was introduced in evidence as Plaintiff's Exhibit 3, for the purpose of showing the number of tires stored and destroyed in the Ice Palace Warehouse. [R. p. 112.] Mr. McClellan testified that this letter, which he referred to as a report in writing, showed the actual number of tires, but that the number of tubes "were estimated." [R. p. 116.]

Mr. Miller, plaintiff's counsel, made the following statement as his reason for asking the witness to state the total number of tires received by plaintiff from "all sources within the district, including Sacramento." He said:

> "We would like to ask this question, we can connect it up. Unfortunately, we do not have the record of the Defense Supplies Corporation as to the tires in this warehouse; the tires were being moved in at the time of the fire; they were appraised before they went in; they do not have the appraisal for these identical tires. They do, however, have records showing the amount paid by Defense Supplies Corporation for all tires received in Northern California under the Idle Tires Program, including these tires.

> These figures are by graded tires and scrap tires. We propose to show the total amount paid out by Defense Supplies Corporation for this several hundred thousand tires, I think it will be that many in this area, which included these tires, and by that means and a computation made by this witness, the average value—the average amount paid by the corporation for each graded tire. I do not think there will be any dispute as to scrap tires, because they paid the same amount for each scrap tire." [R. pp. 116-117.]

Mr. Miller said:

> "There was a different amount paid. The grades of tires, as I understand it, were new, used, and retreads. There were various grades of each. They were appraised at the ceiling price by appraisers. At the time there was no market for these tires in the legal sense of the term; they were tires taken by the government; there was no ready sale for them, because buyers were prohibited from buying unless they had the necessary OPA certificate. We are in this case unable to show what the market value of these tires was." [R. p. 117.]

Thus it appears that plaintiff's plan and purpose was objectionable as employing a means of proof as to the number of the tires destroyed, and the amount paid for them, whose results were admittedly indefinite and speculative.[1]

It is apparent, also, from the above statement that plaintiff did not expect to rely upon the letter "Exhibit 3" to fix the number of tires and tubes involved, the

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[1]Damages which are wholly uncertain cannot be made certain by adoption of an arbitrary standard of loss. (*Dexter Portland Cement Co. v. Acme Supply Co.,* 133 S. E. 788, 147 Va. 758.)

reason being that the statements in the letter were hearsay, even as to the Chevrolet Company. It was finally so recognized by the court. [R. p. 149.]

Mr. Miller was very frank in answering questions by the Court. He said:

> "We do not know how many of each grade, but we would like to put in evidence as to the amount the Defense Supplies Corporation paid for all of the tires, a large number in this area. We feel that the average value, the average cost or average amount paid is a fair indication of what the Defense Supplies Corporation paid for these tires. It is evidence that we think should be before the court, because we are unable in this case to show what the market value was of these tires, in which event, I believe, according to law, we are permitted to put in all evidence of value which would tend to aid the court in determining what they were actually worth, because they did have a value." [R. p. 118.]

The record shows as follows:

> "Mr. Miller: We do not know how many were new tires, how many used, and how many retreads.
> * * *
>
> The Court: Do you know, Mr. Getz?
>
> Mr. Getz: I don't know. All I can say is I don't know, but in any event we object further because it is highly speculative. There are not only different grade of different tires, but there are different prices for different sizes; there are as many sizes as there are tires made in the automobile industry. One tire of one grade may be worth $1, and a tire of larger size in the same grade $2 and $3, and to attempt to get at it in this way would be highly speculative, highly prejudicial to us, because we have no way of cross-examining.

A. We did not sell them to the Rubber Manufacturers Association of America. They were our distributing agents.

Q. The price to them was less than the cost of the Defense Supplies Corporation, was it not? A. We did not sell them to the R. M. A. A.

Q. Did you fix a price at which they could resell them for you? A. I believe we did.

Q. Wasn't it less than the price which you paid for them? A. I could not say." [R. p. 119.]

The witness then testified that there were six grades of tires; that the "lowest grade in the smallest size had an appraised value of $2.75," and that "would be the lowest grade tire." He said that the "highest grade of the largest tires" was appraised at "anywhere from $12 up to $25." [R. p. 120.]

The complaint asked for $76,000 damages for the tires alleged to have been burned. Mr. Miller said "this was based on a price of $3.48 for each graded tire, being the average paid" by plaintiff "for all graded tires received in the program in Northern California." [R. p. 122.]

The court then advised counsel, as follows:

"I will allow all of the testimony to go in as to the prices that you paid, and the prices that you appraised the tires for each grade, and then we can determine at a later date whether it would be proper as a matter of law whether the Court can properly consider it anything more than the lowest appraisal." [R. p. 121.]

The following observations were made:

"Mr. Wallace: If your Honor please, I would like, for the purpose of the record, to make one further

objection, which is based upon the testimony of this witness, that he does not know whether or not the Defense Supplies Corporation sold all of the tires they bought at a fixed price which was substantially lower than the price at which they purchased them, and I think, under the circumstances, the market value, that is what the witness is attempting to do, would be reflected by the price at which they sold, not the price at which they purchased; so these figures get even more remote from establishing any kind of a market value.

Mr. Miller: I must say that so far as saying that the amount which Defense Supplies Corporation sold these tires was the market price, that certainly, in my opinion, is not legally the market price in the sense that we understand the term 'market value.'

The Court: Counsel, I do not want to get into an argument of this case now. There is nothing in the record as yet as to what factors should be taken into account in determining the value of these tires." [R. p. 123.]

Mr. Miller next attempted to show what plaintiff paid for the tires, and his questions brought forth the following information from Mr. McClellan:

In the district of Northern California 545,006 tires were received, of which 283,857 were graded and 239,820 were scrap tires. $989,191.41 were paid for the graded tires. [R. p. 124.]

McClellan admitted that as to four of the six grades of tires shown in plaintiff's records grades 1, 2, 3 and 4 were merely "graded as a total," the total being 279,933 for which plaintiff paid $942,197.43. It paid $18,011.38 for 988 new tires and $28,982.60 for $2,938 retreads,

and $49,719.00 for scrap tires, at 20 cents each. [R. p. 125.]

McClellan said that in the whole area 7,133 tubes were received; that 385 were new, for which $1,336.14 was paid, and $9,934.80 was paid for the used tubes. [R. p. 126.]

Thus, the conjectural character of the testimony is accentuated by the lumping of grades 1, 2, 3 and 4 so that, as to them, any attempted averaging on the guesswork theory that the averages were stored in the Ice Palace is further weakened by the uncertainty that this is true as well as the uncertainty that the tires there stored were numerically, by different priced grades, the net average for the whole area of Northern California.

Mr. Miller then, over the original objections by attorneys for appellant and the Lawrence Warehouse Company[2] was permitted to introduce a document, which Mr. McClellan testified was a copy of OPA ceiling prices in effect during the period involved as "Plaintiff's Exhibit 5."

Also, said last mentioned attorneys added to the objection first made by Mr. Wallace that: "Counsel is attempting to show, as I assume, the value of particular tires by showing average prices throughout a very large area for a very large number of buyers, which is too remote and too speculative to determine value of particular tires." [R. p. 133.]

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[2]It was understood that the objections orignally made extended to that entire line of testimony. [Tr. 131-133.]

Mr. McClellan testified that the appraisers were instructed to follow this price list in valuing the tires. [R. p. 130.] No appraiser was called to testify that he followed such instructions.

The plaintiffs also introduced evidence as to transportation costs and storage payments, which the court ruled was incompetent. [R. pp. 134-136.]

On cross-examination, in answer to questions by Mr. Wallace, the witness testified that the appraisal of the tires was made by appraisers appointed by plaintiff, with which the warehouse had nothing to do [R. p. 147]; and the witness admitted that he had no personal knowledge of "how many tires in that warehouse were graded"; that all he knew about that was what was reported in the letter, Plaintiff's Exhibit ..... [R. p. 148.]

That the court recognized that the Chevrolet Company letter was purely based on hearsay, is shown as follows:

> "Mr. Wallace: I think that is sufficient. The point I make about it is as far as the warehouse company is concerned that reference in the letter as to grading was pure hearsay on the part of the Capitol Chevrolet Company, because they neither graded or appraised the tires.
>
> The Court: I understand they got the information from appraisers.
>
> Mr. Wallace: I do not think there has been any evidence on that, at all.
>
> The Court: Clear it up if you wish to.
>
> Mr. Wallace: I take it that this witness testified that he does not know anything about it except the information which he got from the letter." [R. p. 149.]

McClellan testified as to the reports of the original appraisers as follows:

> "A. We have a report on each tire appraised, but they are filed in such a manner that it would be difficult if not impossible to segregate them. We have the individual appraisements and reports.
>
> Q. But is there any way you can, from your reports, tell us (a) what tires were in that warehouse, and (b) how they were appraised, and (c) what class they were in, what grade? A. No, there is not, because the minute it was appraised it lost its original identity.
>
> Q. So there is no way you can tell us from your records what tires were in the warehouse, what the grade of those tires was, and how much they were appraised, or what stores they were in? A. No." [R. pp. 149-150.]

Let us pause and appraise the situation as presented up to this point. When the appraisals were made by plaintiff's employees, if they were following instructions the OPA price ceilings were made the basis of the appraisements. The appraisers apparently make reports showing the items of tires and tubes taken from owners and appraised, the grades of each item, its type and the price allowed the owner.

However, McClellan swore, the "minute" the appraisers' reports were filed in plaintiff's office, each one "lost its original identity," the result being that by reason of plaitntiff's inept and typically beaurocratic method of conducting the Government's business, plaintiff "had no way" by which, "from its records," it "could prove in court," what "the grade of those tires was," or "how much they were appraised, or what stores they were in."

It seems inconceivable that any one, representing a private concern or individual, would even ask a court to render a judgment for damages for loss of property based on a claim made in a complaint that the articles allegedly lost were stored in a certain warehouse, knowing that he could not prove that any article was ever stored there; that he could not even prove the value of any article, even as appraised by his client's own employees, and that he had no way of showing that the articles which in some manner had become missing had any one of four possible values.

As far as this record shows by plaintiff's own proof and the statements of its attorney, its only reason for suing appellant and the Lawrence Warehouse Company was that plaintiff had stored an unknown number of tires and tubes in the Ice House Palace; that a fire occurred there and a large number of plaintiff's tires and tubes are missing.

This Government Agency calmly and confidently announced that it had dumped $76,000 worth of Uncle Sam's tires and tubes within the walls of a warehouse, neither retaining an inventory nor requiring a receipt or any memoranda of the property.

This Agency also, with equal assurance, revealed to the Court that in buying the tires and tubes, it deliberately effaced every means by which defalcations, thefts, incompetence, gross carelessness or graft of its appraisers or others employees could become known or be proved.

That the trial judge properly foresaw the difficulties and his responsibilities is apparent from the unusual course pursued. Although from the beginning it was plain that McClellan's testimony would all be based on

hearsay and that damages would be fixed upon a purely arbitrary standard the Court received the testimony unhesitatingly, subject to all defense objections.

Thus, we see the situation at the point when appellant's attorney, Mr. Getz, took over the cross-examination of the witness McClellan.

The witness at once admitted that according to the price list furnished appraisers, used tires might have been appraised and have cost as little as 90 cents or even 75 cents each because of deductions for needed repairs. He admitted that "a percentage of all used tires were 'in bad shape'; that people in selecting the tires which they were compelled to sell usually kept the best and 'turned in the worst they had.'"

McClellan admitted that by reason of this factor, there was no way of determining what was actually paid by plaintiff for the "$14,000 graded tires which were claimed to have been in the 'Ice Palace.'" [R. pp. 150-151.]

He also admitted that this factor might have "varied from 90 cents on up to the highest price."

McClellan, for the first time, testified that the plaintiff paid the owner whatever price the appraiser placed on tires. He also admitted that the original grades as appraised were afterward often regraded, up or down, in selling or disposing to dealers or turning them over to R. M. A. A.

Thus, two more elements of uncertainty were added to the confusion and qualifications already existing.

Mr. McClellan asserted that he did not know whether the prices which his list contained were different when sold to wholesalers than when sold to retailers, and that his list was "the retail prices."

It requires only common knowledge and common sense to know that no wholesaler would pay the retail ceiling price, which would necessarily mean that he must lose all handling costs and make no profit.

Since the R. M. A. A. was an agent of the plaintiff [R. p. 153], whether sold through said agent or directly to dealers, plaintiff necessarily sold at a loss, because no dealer could pay ceiling prices and resell without loss at the same prices.

Hence, plaintiff's actual loss, when a tire or tube was destroyed, was less than the price paid, but no one testified how much this margin was.

On redirect examination, if that were possible, the situation from plaintiff's point of view was further muddled.

McClellan testified that the tires were substantially all delivered graded to the Ice House Palace; that 580 tires were delivered there direct from owners by Railway Express and whether these were ever graded, he failed to state. [R. pp. 155-157.]

However, since as the witness had testified that the tires were sometimes regraded at the warehouse where they were first received, and before payment for them was made, by the time the tires were stored in the Ice House Palace, an "unknown percentage" of them had been graded up or down from the original appraisement list, a copy of which was the basis of McClellan's hearsay testimony.

Conclusion.

A Government corporation is in the same category as a private corporation and has no greater right than a private corporation. This has been the holding of the Supreme Court of the United States and it should govern this case.

We respectfully submit there is absolutely no proof of negligence on the part of the Capitol Chevrolet Company, or of any appellant, and the judgment should be reversed upon this ground alone.

Among other grounds for reversal are the construction of the law relating to the measure of damage in which we respectfully submit that the Court erred.

We pray for reversal of the judgment upon each of the grounds presented by this appeal.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Capitol Chevrolet Company.